THE

AMERICAN LAW REGISTER

AND

REVIEW.

JANUARY, 1893.

A NEW CANON OF CONSTITUTIONAL INTERPRETATION.

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No one but the late Mr. Binns[1] has been able to resist Chief Justice Marshall's short, pithy demonstration of the power and duty of courts to disregard statutes when unconstitutional. "The theory of every such government (one having a written constitution), must be, that an Act of the Legislature *repugnant to the Constitution* is void."[2] The case of by-law and charter in ordinary practice is a perfect analogy.

This rule, which also applies to State laws repugnant to State constitutions, was enunciated in Marbury *v.* Madison, and has always been applied by the courts. But how slight has been its capacity to restrain our judiciary from a reckless use of the power thus authoritatively recognized as existing!

[1] The author of Binns' Justice. A statement made in convention.—[Ed.].

[2] Op. in Marbury *v.* Madison, 1 Cr. U. S., 177 (1803). See an interesting discussion on the question to whom the credit is due for first communicating this doctrine, in Carson's Hist. of Sup. Ct., p. 120.—[Ed.].

A good illustration of the truth of this last assertion is found in Pennsylvania. A former chief justice of that State, Mr. Justice GORDON, held that the legislature could not interfere with the contracts of grown men by prohibiting the payment of wages by orders on stores for supplies.[1]

[1] The case in which this doctrine was enunciated was that of Godcharles & Co. *v.* Wigeman, 113 Pa. St., 431 (1886). The case was a suit by a workman in an iron mill for wages. The defendant company by way of set-off attempted to introduce in evidence payments of wages made in store orders at the request of the plaintiff. The plaintiff objected to the evidence, on the ground that payment of wages in anything else than lawful money of the United States was illegal under the Act of June 29, 1881, P. L., 147. The object of this Act was "to secure to operatives and laborers engaged in and about coal mines, manufactories of iron and steel, and all other manufactories, the payment of their wages at regular intervals, and in lawful money of the United States."

Sec. 2 of the Act provides that: "All persons, firms, etc., . . shall settle with their employees at least once in each month and pay them the amounts due them for their work and services, in lawful money of the United States, or by cash order." The third section made it unlawful to issue an order other than a cash order. In view of this Act the objection of the plaintiff to the evidence was sustained by the trial judge. The Supreme Court of the State ordered a new trial, on the ground that the evidence should have been admitted, the Act being unconstitutional. The ground was broader than need have been taken. Constitutional or unconstitutional, the defendants offered to prove that they had given the store orders to the plaintiff at his request, and he had received the benefit from them. The fact that A benefits by the illegal act of B, which act he solicits B to perform, can be considered by a jury as a set-off in an action by A against B. Granted that the Act was unconstitutional, the jury had a right to estimate the amount of the benefit which the plaintiff received from the defendant at the plaintiff's request, even though the act of the defendant was illegal. The jury, of course, would consider the actual benefit, and not the face value of the store orders. There was probably a payment, if the workman wished it to be made in pork rather than money. It would be almost absurd to say that the legislature meant to say that an accord and satisfaction left the debt as before if it happened to be a debt for wages; the act was aimed at the contract to accept orders, not at the voluntary acceptance of the goods mentioned in the order.

The Court, however, chose to grant a new trial on the ground that the Act was unconstitutional. But it is not clear, from the reported opinion, whether they considered the Act unconstitutional because it was in conflict with the Federal Constitution, or with some express prohibition in the State constitution, or on the ground that a State constitution, by general grant of legislative power to the State government, will never be

That men at the time of the adoption of the Federal Constitution believed in the power of State legislatures, unless restrained by the constitutions they were framing, Federal or State, to do much mischief, injustice and iniquity, cannot be disputed. Else why do we find them putting a muzzle on

presumed to grant the power to interfere between the contracts of grown men. The Court in its opinion, through Judge GORDON, says: "The first, second, third and fourth sections of the Act are *utterly unconstitutional and void*, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.

"He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or his coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

The Act could be argued to be in contravention of the Constitution of the United States only on the theory that the Fourteenth Amendment in protecting the rights of "citizens of the United States" from violation by a State, reads into the Constitution as prohibitions on the States, the prohibitions on the United States Government respecting the liberty of individuals. These prohibitions, according to this view, are either written, as in the case of the first eight amendments to the Constitution, or implied, as was contended by the late Mr. Justice BRADLEY in his dissent in the Slaughter House Cases, where he upholds the opinion that since the United States must be presumed to be impliedly forbidden to deny to a citizen of the United States the rights of a free-born Englishman, among which is the right to carry on any trade or occupation he desires, the States, after the adoption of the amendment, could not grant monopolies except to carry out the police laws. See Slaughter House Cases, Dist. Op., 16 Wall, p. 114–116; AMERICAN LAW REGISTER AND REVIEW, Vol. XXXI, 272–275 (April, 1892.).

The point of view here taken is, that a written constitution adopted by a free people, though it confer upon the legislature ever so general grants of legislative power, will never, without express words to that effect, be deemed as granting to the legislature the right to disregard the fundamental principles of individual liberty which are found imbedded in the hearts and engraved in the laws of all English-speaking people. The boundaries of these principles may be hard to define, but, it is contended, they do exist, and when plainly disregarded by legislative bodies, it is the right and duty of the Court to set the law aside.

This point of view regarding constitutional law holds good with State judges interpreting a State constitution.

The whole question involved in laws like the one whose constitu-

the power to murder by Act of Assembly; to rob by statute; to convert innocence into crime, and punish it as such by the same law? The power of the legislature to do these things was believed in when our Constitution prohibited attainders and *ex post facto* laws, and compelled compensation for the taking of private property for public purposes. That little regard has been paid by the legislatures of our States to the spirit of these restraints is evident. The reason is not difficult to find or far to seek. But it is no justification for a court to interfere with the discretion of a State legislature, because the persons possessing the discretion cannot be trusted, or because there exists no appeal from the court's judgment.

The spectacle of a government that cannot prohibit a contract merely because two grown persons desire to make it, is so utterly absurd as to be quite beyond the region of discussion if government of any kind is to continue. The wisdom of the particular interference may be debatable, but it is simply ridiculous to assert that a State has no right to interfere with the individual's right to contract when courts uphold the power of the State to forbid a harmless wager, the contracting of a debt for whisky, and a promise to pay a larger price for a risky loan of money than for one as secure as the State itself. If we compare the assertion in Godcharles & Co. *v.* Wigeman with that since made by the same court in Com. *v.* Biddle,[1] to the effect that the State can make it criminal to make any contract unless the State is restrained by the State constitution, we have what certainly cannot be called the harmony of the law on this very important subject of daily life. Both of these are mere dicta.

tionality is here denied, whether we consider them as violating the Constitution of the United States, or of the State, in cases where no express prohibition appears in the State constitution, is this:—Where a free people adopt a written constitution, are there any implied limits on general grants of legislative authority; and if so, what are these implied restrictions, and do they prohibit the legislation whose constitutionality is in question?—[ED.].

[1] 139 Pa. St., 115.

It is quite astonishing to note how men who have dealt with constitutional questions cannot see, or rather will not act on the plain rule that a constitutional question is, and must always be, so far as a court is concerned, a question of *power*, not of *right*. Constitutions might limit the power of the legislature by a standard of justice of which the legislature is not to be the judge. Yet in all the wild endeavors to fetter the government nothing so absurd as this has ever been attempted. But how invariably have the courts fallen into the snare of substituting the question of right for the question of power, thus converting themselves into a legislature! It seems to have escaped their observation that this course tends to remove from the legislature all sense of obligation. Constantly we find things done by them with a reliance on the courts to correct the iniquity if there be any.

Chief Justice GIBSON, of Pennsylvania, once announced that there was nothing to prevent the legislature taking private property for private uses. He retracted, it is true. In doing so, however, he failed to see that not one private bill, by which selling or mortgaging another's property was authorized, can possibly be sustained except upon the theory that the legislature has power to take the property of one man and give it to another. On the question of *power* there is no distinction between a compulsory sale and confiscation or between property of a man of forty and of a child of twenty-one less one day.

The most striking instance, however, of the loss of an anchorage in constitutional interpretation is to be seen in Budd *v.* New York.[1] A dissent of three judges shows that the case was warmly discussed. And yet, while the sole question was the power of a State to regulate prices charged by a grain elevator, not one person, counsel or court, seem to have started with the simple inquiry — where is the clause in the Constitution which prohibits such a thing? On the contrary, time-honored sentences from Magna Charta, supposed to be embodied in the Constitution of the

[1] 143 U. S., 517 (1892).

United States, was the nature of the argument relied on. And all we can infer from the judgment is that it is not improper to apply the principles of the Magna Charta to exclude the power of the State to name prices for commodities or services. Yet who could ever suppose it to have such a meaning?[1]

It may be very disagreeable to accept the proposition that the legislature of a State can alter prices; to wake up to the consciousness that the legislature, if it sees fit, can regulate what we shall eat and what we shall drink, and wherewithal we shall be clothed, and what kind of business we shall engage in, but it is plain this is the case unless there is a restriction imposed by something that is not in the Constitution. With regard to drinking, no one has ever questioned the power of the legislature and it is exercised everywhere; and if the Constitution does inhibit such legislation, how can we except what is called the police power from that inhibition? Is there anything more grotesque than the modern rule which overrides by impli-

[1] The dissent of Mr. Justice BREWER is nevertheless in strict accord with all his previous utterances on constitutional questions. He says, p. 551: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property is both the *limitation and the duty of government*. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward,' is nearer than a dream." Compare with his opinion in State *v.* Nemaha Co., 7 Kas., pp. 554–5: "The object of the constitution of a free government is to grant, not to withdraw, power. The habit of regarding the legislature as *inherently omnipotent*, and looking at what express restrictions the Constitution has placed upon its action, is dangerous and tends to error. Rather, regarding first, those essential truths, those axioms of civil and political liberty upon which all free governments are founded; and, secondly, statements of principles in the Bill of Rights, upon which the governmental structure is reared, we may then properly inquire what powers the words of the Constitution, he terms of the grant, convey." Compare also opinion of Mr. Justice MILLER in Loan Asso. *v.* Topeka, 20 Wall., p. 663 (1874).

See also cases cited in article entitled "Is the Bounty on Sugar constitutional?" 31 AMER. LAW REG. AND REV., 301 (May, 1892)—[ED.].

cation the express words of the Constitution by calling this new functionary *the police power*? Such was the war power that was once supposed to suspend the Constitution.

There is no difficulty in the matter except that of being willing to trust the powers that be. We should remember that there is an unwritten Constitution here quite as much as there is in England. That the courts cannot enforce it on the legislature here any more than they can there appears to be deemed unimportant. Yet it is not to be enforced by the courts here, any more than by English courts. And we may with perfect confidence say it is quite as sacredly observed and much more so than the written one. No one has ever heard of an attempt to take A's property from him and vest it in B *unjustly*. And yet private bills did take property every year in Pennsylvania till the Price Act, of 1853, and never once worked anything but justice, and quite as well as it has been done since the power has been committed to the courts. I know of two instances under the direction of the courts which one may confidently say could not have been got from the most careless legislature that ever sat at Harrisburg. Nor were they cases in which the attention of the Court was not called to the facts.

But to revert to the case of Budd *v.* New York, which seems to be fraught with evil incalculable and immeasurable. The majority sustain the statute regulating prices under the police power, and because the public may or even must employ the elevators, though the supposed restriction which is thus avoided is not in the written Constitution. If this is true of the elevator business, may it not be as truly said of any other business? And yet the majority and minority assume the want of power to regulate prices. Look at our act, making it criminal to *agree* that a bushel shall be more or less than seventy-six pounds. Look at the bread act, making it criminal to sell by the loaf. But the wonderful thing is no one who sustained the statute called attention to the want of a prohibition or made the point that till this was set up there was nothing to discuss. Not one person, counsel or judge seems to have

been aware that the primary question is that stated in Marbury *v.* Madison. To what part of the Constitution is this repugnant? Not of course that they did not all know the rule, but that it was to be applied in practice as well as announced. There is, indeed, a show of placing the decision on the express words of the Constitution by citing the first section of the XXIVth Amendment. But in a country where the hire of money is fixed by law it would be absurd to suppose this was under the scope of that amendment. The real argument, however, is based on, first, the obsoleteness of the theory of paternal government, not on any restriction on the legislation; second, on the unequal operation of the law. It may be assumed that if there had been a pretence of any express prohibition it would not have escaped the attention of Mr. Justice BREWER, Mr. Justice FIELD and Mr. Justice BROWN.

The climax is arrived at when the *inalienable right to life, liberty and the pursuit of happiness* is gravely contended to be a ground for refusing to enforce a statute like this. Very clearly inalienable by the legislative power, not by the individual, is here meant. The Court was not dealing with the question of a suicide or a nunnery. In a country where we alienate life by the halter, and restrain liberty by jails, and prohibit the use of ardent spirits and beer, quite regardless of how fruitless is the pursuit of happiness to many under such restrictions, one cannot but stop to ask what men mean by these words or if they attach any real meaning to their words. For it is as plain as day that it is quite immaterial whether the legislature or the Court are vested with the prerogative of determining in what respect and when the owners of these inalienable privileges may be deprived of them against their will.

The importance of all this lies here. At the present time the reasons found in opinions of judges are accepted as law. The decision of the Court is overlooked.[1] And therefore we shall be met hereafter with the necessary de-

[1] The Court itself is much to blame for this. In place of the point decided we are generally referred to an utterance of a judge or of the Court speaking by Mr. Justice So-and-so.

duction from these opinions—a new canon of constitutional law, viz.: that *a statute interfering with "natural rights" must be shown to be authorized, not that it must be shown to be prohibited.*

Philadelphia, November 30, 1892.

CAN PRICES BE REGULATED BY LAW?

AN EXAMINATION OF MR. ARTHUR T. HADLEY'S ARTICLE, "LEGAL THEORIES OF PRICE REGULATION."

BY WM. DRAPER LEWIS, PH.D.

MR. ARTHUR T. HADLEY, in the first number of the *Yale Review*, has an exceedingly able and very entertaining article on "Legal Theories of Price Regulation."[1] The article is historical in form. Commencing with the Roman law, he points out how nowhere has the doctrine that a man is absolute master of his own property, in respect to the price at which he will sell it, or the charge for its use, been carried out so consistently as at Rome. On this point he says: "Such a state of things was only possible where law was highly developed and commercial transactions but slightly so. In ancient Rome both of these conditions existed in a marked degree. The Romans were able to command the products of the world by the compulsory labor of slaves at home, and taxation of people who were little better than slaves abroad. The rich did not need to sell; the poor did not need to buy. Under these circumstances price was a matter of trifling importance compared with that fixity of tenure on which the Roman organization rested." Then the writer shows how in mediæval Europe farmers, being obliged to trade with artisans, an exchange was no longer an isolated transaction, but "part of the work of supplying a market in which all producers, to a greater or less degree, were interested." Consequently

[1] *Yale Review*, Vol. I, p. 56 (May, 1892).